

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

JULY 2, 1997

Paper No. 17  
EJS

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Sunbeam Corporation

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Serial No. 74/426,733

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Paul D. Bangor of Thorp Reed & Armstrong for Sunbeam  
Corporation

Richard Cole, Trademark Examining Attorney, Law Office 104  
(Sidney Moskowitz, Managing Attorney)

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Before Rice, Simms and Seeherman, Administrative Trademark  
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

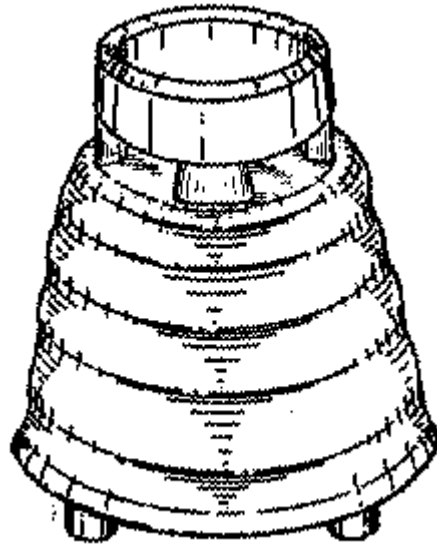
Sunbeam Corporation has applied to register the  
configuration shown below as a mark for "electric food  
blenders for domestic use."<sup>1</sup> Applicant has provided the  
following description of its mark:

The mark consists of the configuration of the base portion  
of the blender.

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<sup>1</sup> Application Serial No. 74/426,733, filed August 18, 1993, and  
asserting first use and first use in commerce as early as 1962.

Applicant has also indicated that the lining in the drawing has been used to illustrate the contours of the base, and is not intended to represent any color. Consequently, the statement, "The lining in the drawing is for shading purposes only" has been entered in the application.



Registration was finally refused on the ground that the configuration is not inherently distinctive, and in the action denying applicant's request for consideration, the Examining Attorney clarified that this refusal was made pursuant to Sections 1, 2 and 45 of the Trademark Act, 15 U.S.C. 1051, 1052 and 1127, because the configuration does not function as a trademark.

Applicant appealed from the refusal. The case has been fully briefed, but applicant did not request an oral hearing.

The question which we must decide in this appeal is whether the configuration shown in the drawing is inherently

distinctive, that is, whether it immediately functions as a trademark, in that consumers will understand upon viewing applicant's blenders that the configuration identifies the source of the blenders.

The record before us is very sparse. In fact, other than the specimen photographs and brochures, no evidence has been introduced. Although the Examining Attorney has asserted that the configuration is a common shape, and is not unique or unusual for goods in this field, he has not submitted any evidence, such as pictures of other blender configurations, in support of this point. Cf. **In re E. S. Robbins Corp.**, 30 USPQ2d 1540 (TTAB 1992), in which the Examining Attorney made of record photocopies of catalogs showing products having designs similar to applicant's configuration.

Moreover, the Examining Attorney has practically conceded that the undulating portion of the configuration is inherently distinctive.

The ONLY thing this Examiner can see as POSSIBLY unusual (or distinctive) is that the sides "undulate" slightly as they progress upward from the bottom of the base. That is, instead of having perfectly flat sides (which would be easier to keep clean) the base has "rounded spaced-apart ribs which circumscribe the base..." in the precise words of the applicant (Response of August 15, 1994). The Examiner is willing to concede that perhaps this particular, specific portion of the configuration is NOT dictated by any functional requirements and MAY possess

sufficient originality to qualify as  
being "inherently distinctive."  
Brief, pp. 3-4.

In view of this apparent concession, and the lack of any evidence to the contrary, we are constrained to find that the undulating portion of the configuration is inherently distinctive.

The Examining Attorney goes on, in his brief, to state that "having conceded this, however, the Examiner must point out that THIS issue is not what this appeal is all about." Essentially, it is the Examining Attorney's position that certain elements of the configuration, such as the round top into which the blender container fits, and the rubber or plastic feet on which the blender rests, are functional, and therefore the configuration as a whole, which includes these elements as well as the undulating portion, is not inherently distinctive.

We agree with the Examining Attorney that the round upper portion of the blender base, and the feet on which the base rests, are functional. Quite simply, there are a limited number of shapes that may be used for the base of a blender container, and a circular shape is one of the most basic. There is also no question that small rubber or plastic feet, such as those shown in the drawing of applicant's configuration will, when applied to the base of a blender give it stability when it is in use, and prevent it from marring the surface of the counter on which it rests.

Applicant does not dispute the functional nature of these features. However, applicant asserts that "the overall configuration of the base of Applicant's blender is not so superior in de facto function or economy of manufacture that recognition thereof as a trademark would hinder competition in the blender trade." Reply brief, p. 3. Essentially, applicant is relying on those cases in which the issue of de jure functionality has been considered, and in which the fact that certain elements of a configuration have some utility has not resulted in the overall configuration being found de jure functional.

However, these cases are inapposite to the present situation, in which the issue is not whether the configuration is de jure functional, but whether it is inherently distinctive.

By depicting the round upper portion of the base, and the feet, in solid lines, applicant is asserting a claim of exclusive rights to these features. However, because of the functional nature of these features, as discussed above, competitors should not be precluded from using a round fitting into which a round blender container is placed, nor should they be precluded from using feet at the base of their blenders. Just as a party must disclaim exclusive rights to a generic or descriptive element in a composite mark which as a whole is inherently distinctive, the applicant herein may not obtain exclusive rights to these

functional and non-distinctive features by combining them with an inherently distinctive feature.

Accordingly, applicant's configuration, as presently depicted in its drawing, may not be registered. However, applicant is allowed thirty days from the mailing date of this opinion in which to submit a new drawing, in which the functional and non-registrable features of its mark, namely, the circular upper portion of the base, and the feet, are depicted in broken lines. See Trademark Rule 2.51(d), TMEP 807.03(a). If such a drawing is submitted, this decision will be set aside, and the application will be approved for publication.

Decision: The refusal to registesr is affirmed.

J. E. Rice

E. J. Seeherman  
Administrative Trademark Judges  
Trademark Trial and Appeal Board

Simms, Administrative Trademark Judge, concurring in part and dissenting in part:

While I agree with the majority that applicant should submit an amended drawing showing the functional features in broken lines, I would also remand this case for the purpose of allowing the Examining Attorney to submit evidence (of which he apparently wishes us to take judicial notice) in support of his argument that applicant's base configuration of its blender is a mere refinement of the shapes of other blenders on the market and would not therefore be perceived as a trademark. While I realize that it is unusual to permit remands for this purpose, I believe that it may be justified in this case.

Applicant's attorney has, on the one hand, argued that the shape of its base, including the rounded and spaced rib design which flares into a wider base (see below), is so



"unusual and unexpected for a blender base that one could assume without proof that it will automatically be perceived by customers as an indicia of origin" (Amendment, filed August 15, 1994, page 3). However, applicant has also argued that the manner in which this shape would be viewed by consumers is not dispositive of the issue of inherent distinctiveness, and that it is not important that consumers associate this design with a particular source. Brief, 2. Applicant argues, I believe incorrectly, that it is, therefore, improper to focus on how the shape would be viewed by consumers. To me, that is the heart of this case. Other parts of applicant's arguments appear to focus on the lack of de jure functionality of applicant's configuration. However, that is not the issue before us. As can be seen, there is some confusion as to the issue before us.

Blenders are relatively common household appliances. Nevertheless, I do not believe that it is appropriate to take judicial notice of the ordinary or usual shape (if



there is one) of such an appliance. The Examining Attorney argues that the shape of applicant's base is but a mere refinement of the relatively common basic round (or square) shape of the base of a blender. As such, according to the Examining Attorney, applicant's rounded and ribbed design would be considered as simply an ornamentation and not a trademark for applicant's goods.

In view of the foregoing and because of the confusion in this record, I would remand this case to the Examining Attorney for entry of the required amended drawing as well as the submission of evidence supporting the Examining Attorney's position that this design is a relatively common shape or a mere refinement of common blender base shapes.

R. L. Simms  
Administrative Trademark Judge  
Trademark Trial and Appeal Board